Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271

COMMENTS OF THE

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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January 17, 2006

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The National Cable & Telecommunications Association ("NCTA") hereby submits its comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.[1] NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving 90 percent of the nation's cable customers, and owners of more than 200 cable program networks. NCTA's members provide video, voice and data services to customers throughout the country. By Year End 2005, the cable industry passed an estimated 115 million homes with high-speed data service. With over 25 million high-speed customers, cable is the leading provider of such services to residential households.[2]

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[1] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Report and Order and Notice of Proposed Rulemaking, FCC 05-150, rel. Sept. 23, 2005 (hereinafter "*Order and NPRM*" or "*NPRM*").

[2] Kagan Research, L.L.C., *Broadband Cable Financial Databook 2005*, at 12.

INTRODUCTION AND SUMMARY

In its *Order and NPRM*, the Commission "established a new regulatory framework for broadband Internet access services offered by wireline facilities-based providers."[3] The Commission explained that the new framework was essential to achieving its goals and "consistent with the Supreme Court's opinion in *NCTA v. Brand X*," which affirmed the Commission's conclusion that cable modem service is an "information service."[4]

While finding wireline broadband Internet access service "is eligible for a lighter regulatory touch,"[5] and the "broadband marketplace ... is an emerging and rapidly changing one,"[6] the Commission "recognized a duty to ensure that consumer protection objectives in the Act are met as the industry shifts from narrowband to broadband services."[7] While telephone companies were the only providers "shift[ing] from narrowband to broadband services" (from dial-up to DSL), the *NPRM* makes clear that the Commission seeks "to develop a framework for consumer protection in the broadband age – a framework that ensures that consumer protection needs are met by *all* providers of broadband Internet access service, regardless of the underlying technology."[8]

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3 *Order and NPRM* at ¶ 1.

4 *Id., citing National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 125 S. Ct. 2688 (2005) ("*NCTA v. Brand X*"), *aff'g Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Proceeding*").

5 *NPRM* at n. 1, ¶ 3.

6 *Id.* at ¶ 146.

7 *Id.*

8 *Id.* (emphasis in original).

For that reason, the *NPRM* asks whether a number of requirements currently applicable to wireline carriers when acting in their role as telecommunications service providers should be applicable to all broadband Internet access providers and services such as DSL and cable modem service, among others.[9] The *NPRM* listed a number of areas of specific concern to the Commission: (1) Privacy (CPNI); (2) Slamming; (3) Truth-in-Billing; (4) Network Outage Reporting; (5) Section 214 Discontinuance; and (6) Section 254(g) Rate Averaging Requirements. The Commission asks whether these and similar requirements can be imposed under the Commission's "ancillary jurisdiction" and, if so, whether they are "desirable and necessary as a matter of public policy, or whether we should rely on market forces to address some or all of the areas listed."[10]

In these comments we address the requirements the Commission has specified in the *NPRM* and whether it is necessary or desirable to apply any of them to cable modem service and the providers of such services. We assume, for purpose of these comments, that the Commission has some ancillary jurisdiction to adopt regulations in this area, although its ability to do so in specific cases will depend on the facts and circumstances regarding the proposed regulation at issue.

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[9] The Commission notes (*id.* at n. 442) that similar questions regarding "necessary regulatory obligations of modem service providers" had been raised in the *Cable Modem Proceeding*, 17 FCC Rcd at 4848-54 (2002). It asks commenters in this proceeding to "refresh the record" to the extent that the issues raised here are duplicative of questions previously raised in that proceeding. In these comments, we do so with respect to "privacy" issues, but most of the issues raised in the *Cable Modem Proceeding* are separate and distinct from the consumer protection matters for which comment is sought in this docket.

[10] *NPRM* at ¶ 147.

These comments address three specific matters: (1) the privacy of cable modem service customer information, (2) proposed reporting requirements for broadband Internet access outages, and (3) general consumer protection safeguards.

With respect to privacy, we believe that the competitive broadband marketplace will ensure providers are responsive to consumer needs. To the extent any new privacy rules are needed for broadband services, all providers of such services should be subject to the same requirements ("like services should be treated alike"). Only Congress can create a common set of broadband privacy rules, however. In the interim, if the Commission concludes privacy rules are needed, it should not require cable operators to comply with requirements other than the customer privacy regime currently applicable to cable services under Section 631 of the Communications Act.

With respect to mandatory outage reporting, as recently as 2004, the Commission revisited its reporting requirements and extended them to wireless carriers and satellite providers, but not broadband Internet access providers.[11] The current reporting requirements apply to circuit-switched telephone service, wireline telephony, wireless and satellite communications. Nothing has changed in the intervening year or so to warrant extension of the outage reporting requirement to broadband Internet access providers.

Finally, as noted, the *NPRM* also raises questions about whether other regulatory mechanisms originally adopted for Title II carriers (Truth in Billing, slamming, Sec. 214 discontinuance, and Sec. 254(g) rate averaging) should be applied to broadband Internet access

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[11] *New Part 4 of the Commission's Rules*, Report and Order, 19 FCC Rcd 16830, 16840 (2004). ("Our outage reporting requirements have thus far been directed only to the wireline telecommunications industry with the consequence that the available communications disruption data have not taken into account newly emerging forms of communications (*e.g.*, wireless and satellite) upon which our Nation has now become so vitally dependent.") (citation omitted) ("*New Part 4 Report and Order*").

providers. However, these requirements have less relevance in the highly competitive broadband Internet access marketplace. To the extent necessary, the concerns raised can be addressed by the competitive marketplace or state (and federal) consumer protection laws of general applicability. We recommend against extending those regulations to information service providers providing broadband Internet access.

I. THE SECTION 631 CUSTOMER PRIVACY REGIME SHOULD SATISFY CONCERNS ABOUT CABLE MODEM CUSTOMERS' PRIVACY

We agree with the Commission's conclusion that "[c]onsumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on telecommunications services."[12] To that end, the *NPRM* sought comment on how to protect the privacy interests of customers of broadband Internet access providers, including on whether and how to forbid broadband Internet access providers from disclosing, without their customer's consent, "information about their customers that they learn through the provision of their broadband Internet access service.[13] In particular, the *NPRM* asks whether the Commission should adopt privacy requirements applicable to broadband Internet access providers similar to those adopted pursuant to Section 222 of the Act that govern the use of customer proprietary network information ("CPNI") by telecommunications carriers.

NCTA agrees with the Commission about the importance of maintaining the privacy of information provided to cable operators by their cable modem customers. As a threshold matter, we do not think new privacy rules are needed because the competitive marketplace will ensure providers are responsive to consumer needs. The convergence which has sparked this

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[12] *NPRM* at ¶ 148.

[13] *Id.* at ¶ 149.

competition has also blurred the lines between traditional and new businesses, with similar services offered by different providers and individual providers offering multiple services. To the extent privacy rules are deemed necessary in this environment, Congress should establish a common privacy regime for all providers of broadband Internet access services so that like services are treated alike. In the absence of such an enactment, the Commission should avoid imposing multiple inconsistent privacy requirements on a given provider if it decides privacy requirements are needed at all. Particularly where providers offer and customers purchase service "bundles," trying to implement multiple privacy regimes would be challenging, to say the least, for consumers as well as providers. As convergence has occurred, the lines between traditional and new businesses have blurred. If there are to be new privacy requirements adopted by Congress, it is important to have a common set of rules applied to all providers of similar services.

Cable operators today are subject to, and comply with, strict privacy requirements under Section 631 of the Act ("Protection of Subscriber Privacy").[14] Section 631 establishes the privacy expectations of cable customers and corresponding obligations of cable operators. If the Commission concludes privacy rules are needed, it should not require cable operators to comply with requirements other than the customer privacy regime currently applicable to cable services under Section 631 of the Communications Act. Section 631, generally, takes a balanced approach to information collection by cable operators.[15] Moreover, the cable industry has over 20 years of experience with the requirements of Section 631.

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[14] Section 631's requirements generally apply to cable operators who "provide cable service or other service to a subscriber...." 47 U.S.C. § 551 (a) (2) (B).

[15] While the disclosure provisions of Section 631 are generally reasonable, its provisions for private rights of action, attorneys fees and liquidated and punitive damages are unnecessary, unwarranted and burdensome.

In our comments in the *Cable Modem Proceeding*, we agreed with the Commission that the provisions of Section 631 generally embody reasonable, effective protections of cable subscriber privacy, as applied to cable service.[16] While those provisions, written for cable's video services, are not a perfect fit as applied to cable's high-speed data services, even such an imperfect fit would be far preferable for consumers as well as cable operators than imposing an entirely different scheme such as Section 222 on cable modem service.[17]

The Commission (and Congress) would be justified in relying on the robust competitive broadband market – which prompted it to deregulate both DSL and cable modem service – to satisfy any consumer privacy concerns. But, if the Commission determines that privacy regulations are desirable and necessary for customers of broadband Internet access providers and if it adopts such requirements, it should ensure that privacy obligations are not inconsistent with the requirements of Section 631.

II. THE COMMISSION SHOULD NOT EXPAND MANDATORY OUTAGE REPORTING TO BROADBAND INTERNET ACCESS

The *NPRM* asks whether the purposes of mandatory network outage reporting for communications services are applicable to outages of broadband Internet access. If they are applicable, the Commission asks whether Title I authority should be exercised to impose similar reporting requirements on providers of broadband Internet access.[18]

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[16] Comments of the National Cable & Telecommunications Association, *Cable Modem Proceeding*, filed June 17, 2002, at 54 ("*NCTA Cable Modem Comments*").

[17] Concerns about being subject to two privacy regimes are not merely hypothetical. Until recently, cable operators arguably were subject to two conflicting regimes with respect to disclosure of information to law enforcement authorities. *See In re U.S.*, 36 F.Supp 2d 430 (D.Mass 1999). That conflict was resolved by the USA Patriot Act which amended Section 631. *See* Pub. L. No. 107-56, § 211(1)(D), 115 Stat 284 (2001) *adding* 47 U.S.C. § 551 (c) (2) (D) (2001).

[18] *NPRM* at ¶ 154.

The Commission should not subject providers of broadband Internet access services to mandatory outage reporting. To the extent the Commission views outage reporting as a form of consumer protection, the marketplace in broadband services provides powerful incentives for cable operators to maintain a high level of reliability. To the extent outage reporting requirements serve the purpose of notifying the government of the status of the nation's communications infrastructure – the apparent purpose of the requirement – the Commission recently revisited its rules and did not extend them to broadband providers. Nothing has changed in the interim to require such an extension of the rules.

The Commission first adopted mandatory outage reporting rules in 1992.[19] Outage reporting was required after massive telephone outages occurred on the East and West coasts in 1991.[20] Reporting was limited initially to circuit-switched telephone service offered by wireline telephone companies. Circuit-switched telephony provided by cable companies was also subject to mandatory outage reporting.[21]

Reporting was extended to wireless and satellite communications in 2004, but only after careful consideration of the issue and the changing rule of those technologies as part of the nation's communications infrastructure.[22] Explaining its proposal to expand outage reporting to wireless and satellite services prior to its decision, the Commission contrasted the roles of wireless and satellite communications in the early 1990's and 2004, and in particular noted the increased significance of wireless and satellite services in emergency communications.

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[19] *Notification by Common Carriers of Service Disruptions*, Report and Order, 7 FCC Rcd 2010 (1992).

[20] *New Part 4 of the Commission's Rules Concerning Disruptions to Communications,* Notice of Proposed Rulemaking, 19 FCC Rcd 3373, 3377 (2004) ("*New Part 4 NPRM*").

[21] *Id.* at 3382.

[22] *New Part 4 Report and Order*, 19 FCC Rcd 16830 (2004).

> Since 1990, wireless communications have grown rapidly and are now increasingly gaining acceptance as an alternative to wireline telephony.... Today, unlike the situation that existed in 1992, many Americans depend exclusively on wireless telephony for emergency communications and expect, for example, to have E911 connectivity in the event of an emergency.... By 2001, there were more than 128,374,000 wireless subscribers nationwide and Public Safety Answering Points ("PSAPs") received approximately 56,879,000 wireless 911 calls. Wireless and satellite paging have also increased in importance and are now commonly used by 911 "first responders," medical personnel, emergency rescue teams, police, fire fighters, and government officials. It is, of course, essential that all of these forms of wireless communications perform reliably in general use but it is even more essential that they do so during times of national emergencies or terrorist attacks.[23]

The Commission further explained that "commercial satellite communications have emerged as a significant part of our communications infrastructure, and ... will play an ever-increasing role in providing important services to the military, to emergency responders, to other providers of communications services for restoration purposes, and to personnel who are involved in Homeland Defense and Security and emergency preparedness (*e.g.*, FEMA) functions."[24] These developments led the Commission to conclude in late 2004 that the nation's wireless and satellite communications, like circuit-switched telephone services, should be subject to mandatory outage reporting.[25]

The Commission was well aware of the role of broadband Internet access in the national communications infrastructure, and specifically in emergency communications, when it issued this ruling. The agency has for many years collected basic statistics on communications common carriers, and has for several years received semi-annual reports on the state of broadband deployment and penetration. In the most recent such report, the Commission found that

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[23] *New Part 4 NPRM,* 19 FCC Rcd at 3381-82.

[24] *Id.* at 3383.

[25] *"Trends in Telephone Service,"* Industry Analysis and Technology Division, Wireline Competition Bureau, FCC April 2005.

broadband Internet access was *available* to more than ninety percent of residential customers but was subscribed to by 32 percent.[26] Nonetheless, the Commission did not even raise the issue of extending outage reporting to broadband Internet access. There is no evidence that circumstances have changed since late 2004.

To the extent outage reporting requirements are imposed on broadband Internet access providers, those providers should only be responsible for reporting outages caused by disruptions to their own facilities. Subscribers may experience outages when accessing the Internet via cable modem, DSL, or otherwise, that are beyond the control of the broadband Internet access provider. Outages may result from a variety of sources, including disruptions to electric power or natural and manmade disasters. Customers purchasing services that ride "over-the-top" of broadband Internet access services may experience failures in portions of the network under the control of the over-the-top provider. Subscribers may also experience service disruptions due to network failures that occur outside of the broadband provider's facilities, such as a failure in the Internet backbone. In each of these cases, the broadband Internet access customer experiences a service disruption that the broadband Internet access provider cannot control. In fact, in some cases, the broadband Internet access provider may not even be able to locate the source of the outage.

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[26] *"High-Speed Services for Internet Access: Status as of December 31, 2004,"* Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, July 2005

These additional factors, and the sometimes indeterminate location of the outage, could make it difficult to satisfy any outage reporting requirements, at least insofar as they would advise consumers or regulators of the location of any problem causing disruption of their services. A failure of circuit-switched traffic will reside in the circuit-switched network; the same cannot always be said for a broadband connection.

III. IN MOST OTHER CASES, THE MARKETPLACE CAN ADDRESS CONSUMER PROTECTION CONCERNS TO THE EXTENT RELEVANT

The *Order and NPRM* acknowledges a basic truth: today's broadband marketplace "is an emerging and rapidly changing marketplace that is markedly different from the narrowband marketplace that the Commission considered in adopting the *Computer Inquiry* rules."[27] In contrast to narrowband services provided over circuit-switched telephone networks, "broadband Internet services have never been restricted to a single network platform provided by the incumbent LECs."[28] Because of this competitive market, and because state consumer protection laws of general applicability apply to providers of broadband Internet access service, it should not be necessary to impose new consumer protection regulations on broadband providers. Moreover, as the *NPRM* suggests,[29] the Commission's informal complaint process should suffice to address issues that warrant Commission attention.

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[27] *NPRM* at ¶ 47 (citation omitted).

[28] *Id.* (citation omitted).

[29] *NPRM* at ¶ 159. The Commission also asks about the appropriate role for state authorities. *NPRM* at ¶ 158. Since cable modem service is an interstate information service (*see Cable Modem Proceeding*, 17 FCC Rcd at 4798) they should not be subject to state or local regulation, except for laws of general applicability. Subjecting cable modem service (or any other broadband Internet access service) to a patchwork quilt of local and/or state laws, enforcement proceedings and interpretations of FCC rules would only impede the development of these emerging services.

The Commission has recognized that the broadband Internet access marketplace is characterized by multiple broadband Internet providers who compete vigorously for customers. And even though cable modem and DSL are the market leaders, there are "other existing and developing platforms, such as satellite and wireless, and even broadband over powerline in certain locations, indicating that broadband Internet access service will not be limited to cable modem and DSL service."[30] With respect to broadband over powerline, in particular, the service appears to be moving from the category of "developing" to the category of "existing."[31]

The Commission further observed that "changes in technology are spurring innovation in the use of networks."[32] Content and applications providers are finding new ways to utilize broadband distribution. Multiple distribution platforms are becoming more widely available and broadband providers are capturing an increasing share of subscribers. Taken together, the changes in technology, the innovative use of networks, and the development, deployment and adoption of new technologies and applications are creating what the Commission recognizes as a new state of affairs for consumers characterized by "the dynamic nature of ... marketplace forces."[33]

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[30] *Id.* at ¶ 50 (citations omitted).

[31] *See "High-Speed Internet Over Power Lines Could Serve Millions,"* THE WALL STREET JOURNAL, Dec. 19, 2005, at B1 ("In a deal that could pose a new threat to cable and phone companies, Current Communications Group LLC and TXU Electric Delivery, a unit of TXU Corp. said they plan to offer high-speed Internet over electric power lines to more than two million customers in Texas.... Cable and phone companies have been competing furiously ... [while providers of broadband over power lines] ... have generally been dismissed as insignificant players with immature, costly technology. But Current's rollout to a wide swath of customers in the Dallas-Fort Worth area and elsewhere in Texas is a sign that the technology is more than a fad.")

[32] *NPRM* at ¶ 50.

[33] *Id.*

Broadband Internet access, whether in the form of cable modem service, wireline broadband service, broadband over powerline, satellite, wireless, or other emerging means of distribution, are marketed to consumers as competitive alternatives. They are viewed by consumers as competitive alternatives. A new layer of consumer protection laws, drawn from rules for telecommunications services in a monopoly era, is not required in the competitive broadband Internet access marketplace. Such additional regulation would add costs to emerging services and therefore impede their further deployment and innovation.

Broadband Internet access service providers possess compelling incentives to ensure that problematic service does not cause customers to turn to a competitor. As a general matter, unless a problem is evident, regulators should stand aside. Broadband Internet access is the prototype of a marketplace in which regulators should enable competitive offerings to continue to evolve.

For example, the Commission suggests that telephone-like truth-in-billing procedures might be appropriate to apply to broadband Internet access providers.[34] The Commission acknowledges that such regulations were adopted, in part, to "reduce slamming, cramming, and other telecommunications fraud ...."[35] The lack of complaints over billing practices strongly suggests that market forces are imposing the necessary discipline on providers. Moreover, the competition described above will enable consumers to redress any persistent billing concerns by switching to an alternative provider.[36] To the extent improper billing and related activities

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[34] *See id.* at ¶¶ 152-53.

[35] *Id.* at ¶ 152.

[36] In the third quarter of 2005, the Commission received a total of 43 consumer complaints relating to cable modem service and 67 complaints concerning billing and rates associated with cable and satellite services. This compares to 3,259 wireless telecommunications billing and rates complaints, and 3,237 wireline telecommunications billing and rate complaints for the same period. The 43 cable modem service complaints are not divided between billing and rates and other types of complaints. *See Report on Informal Consumer Inquiries and Complaints*, Third Quarter Calendar Year 2005, FCC Consumer & Governmental Affairs Bureau, at 9.

amount to fraud, state (and federal) laws suffice. Therefore, the Commission need not adopt truth-in-billing regulations for broadband Internet access providers.

As a separate matter, the *NPRM* asks whether slamming rules should be imposed on broadband Internet access providers. However, even the *NPRM* expresses skepticism that slamming is a technical possibility because cable modem subscribers generally install a modem specific to the cable modem provider, as well as provide a proprietary password that enables the customer to access the ISP's service.[37] NCTA agrees. The use by the cable company of the cable-provided modem, in combination with the proprietary password, precludes any significant risk of slamming in the broadband context. As a result, slamming rules seem inapplicable to broadband Internet access providers.

The Commission also asks whether procedures akin to the Section 214 discontinuance procedures for Title II telecommunications services should be required for broadband Internet access providers.[38] But the policy reasons underlying those requirements – most significantly, enabling customers to receive advanced notice of a discontinuance of service so that they might make alternative arrangements – are not applicable in the case of broadband Internet access service because broadband (and narrowband) alternatives are available.[39] To answer the question the Commission asked using its own words: "the multiplicity and availability of broadband Internet access providers mitigate[s] the need for such [Section 214] notice.[40]

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[37] *NPRM* at ¶150, n. 453. Similarly, wireless carriers are exempt from slamming requirements because a customer must obtain a handset usable on a provider's network in order to obtain service. *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1559 (1998).

[38] *Id.* at ¶ 155.

[39] *Id.* at ¶¶ 155-56.

[40] *Id.* at ¶ 157.

Finally, the Commission asks whether requirements similar to those adopted under the Section 254(g) rate averaging process might be made applicable to broadband Internet access providers or whether it needs to take steps to assure that its actions "do not jeopardize the policies of section 254(g)."[41] It seems clear that, whatever the merits of rate averaging with respect to lifeline telephone service in rural areas, that requirement should not be applied to the emerging, evolving, and competitively-priced broadband Internet access service. The Commission has concluded as much by forbearing from applying rate averaging requirements to private line services, including DSL.[42] It should reiterate that conclusion in this docket.

CONCLUSION

In the *Order and NPRM*, the Commission reached "a classification determination that is consistent with ... [its] ...decision in the *Cable Modem Proceeding*, as affirmed by the Supreme Court."[43] It decided "the appropriate framework for wireline broadband Internet access service, including its transmission component, is one that is eligible for a lighter regulatory touch."[44] The Commission expressed confidence that the regulatory regime which it adopted "will promote the availability of competitive broadband Internet access services to consumers, via multiple platforms, while ensuring that adequate incentives are in place to encourage the deployment and innovation of broadband platforms"[45] As indicated above, as a general matter, the Commission should extend its "light regulatory touch" to issues it has raised in the *NPRM*, since the

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41 *Id.*

42 *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 11 FCC Rcd 9564 (1996).

43 *Order and NPRM* at ¶ 3.

44 *Id.* at ¶ 3 (citation omitted).

45 *Id.* (citation omitted).

competitive marketplace will provide incentives for broadband Internet access providers to address these consumer concerns. Should it decide to adopt any requirements, it should harmonize them to the extent possible with existing requirements.

Respectfully submitted,

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